Supreme Court, U.S.
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No. 89-5

In The
Supreme Court of the United States
October Term, 1988

RICHARD D. ELLENBERG as Trustee in Bankruptcy for Rodger and Rodger, Inc.,

Petitioner,

vs.

T & B SCOTTDALE CONTRACTORS, INC.,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RICHARD D. ELLENBERG*
LESLIE J. BRYAN
ELLENBERG & BRYAN, P.C.
83 Walton Street, N.W.
Atlanta, Georgia 30303
(404) 525-4000

Counsel of Record

Tower Printing Company, 2 Peachtree St., Atlanta, GA 30383 (404) 659-4080

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T & B SCOTTDALE CONTRACTORS, INC.,
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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner submits this Supplemental Brief in accordance with Supreme Court Rule 22.6 to call three things to the Court's attention.

I. THE CITATION TO IN RE TLEEL

The first is the citation to the case of In Re Tleel, ___ F.2d ___, 1989 WL 56243 (9th Cir. 1989). That case is now reported and may be found at 876 F.2d 769.

II. THE APPLICATION OF THE CIRCUIT OPINION

The second purpose of this Supplemental Brief is to call to the Court's attention the manner in which at least one lower courts has applied the Eleventh Circuit opinion in the matter now before this Court, thus strengthening Petitioner's argument concerning the far-reaching implications of the Eleventh Circuit opinion. (See Petition at pages 35 - 46).

The case in question is In Re Harvey Oil Co., Bankr. Case No. 88-01625 (Bankr. N.D. Ga. June 23, 1989). (Appendix A hereto). In that case the debtor, a minority contractor, was to supply fuel oil to AMTRAK but, when it became unable to do

so, the debtor agreed with Petron Oil Corp. that Petron would supply the fuel and submit Debtor's invoices to AMTRAK. All parties, including AMTRAK, agreed that AMTRAK owed either the debtor or Petron $44,560.00 for fuel.

Petron's claim to the fund was based on the constructive trust principles that the Eleventh Circuit endorsed in this case. The Trustee reached a compromise with Petron that resulted in the payment of $15,560.00 to the Estate and $29,000.00 to Petron. Absent the constructive trust theory, the entire $44,560.00 would have been available for distribution to the Estate.

Thus, the Eleventh Circuit's ruling is already having the anticipated effect in the bankruptcy courts of shielding some assets from distribution through the Estate.

III. T & B'S CASES DISTINGUISHED

Third, Respondent cites two cases for the proposition that in Georgia a judgment lien creditor may not make a claim to a special account. Those cases are Jasper School District v. Pickens County, 187 Ga. 433, 200 S.E. 780 (1939) and Manget v. National City Bank, 168 Ga. 876, 149 S.E. 213 (1929). Both cases involve Bank accounts and a claim that the Bank had such actual knowledge of the special nature of the account and actual knowledge that the funds in the account were intended for the benefit of the third party, that the Bank could not be allowed to set-off against the account. Those cases do not involve a judgment lien creditor, especially one without actual knowledge which is the status of the trustee under 11 U.S.C. 544. Rather, they turn on the actual knowledge of the Bank and do not vary the rule that a

judgment lien creditor prevails over an undisclosed interest.

Respectfully submitted

Richard D. Ellenberg*
Leslie J. Bryan
ELLENBERG & BRYAN, P.C.
83 Walton Street, N.W.
Atlanta, Georgia 30303

* Counsel of Record

APPENDIX A

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	:	
	:	IN BANKRUPTCY CASE
HARVEY OIL CO.,	:	NO. 88-01625
	:	
	:	(CHAPTER 7; JUDGE
Debtor.	:	COTTON)

NOTICE AND ORDER

TO: The Debtor, Debtor's attorney, creditors and all other parties in interest.

Notice is hereby given that the trustee of the above-named Debtor's estate has moved the Court for authorization to settle and compromise all claims as to the sum of $44,560.00 being held by National Railroad Passenger Corp. ("AMTRAK") under a contract with the Debtor to supply diesel fuel. Petron Oil Co. ("Petron"), which actually supplied the fuel to AMTRAK pursuant to an arrangement with the Debtor, claims entitlement to the funds as the beneficiary of a constructive trust against which the funds should be impressed. Petron also has a claim against AMTRAK based upon AMTRAK's delivery of a check to the Debtor in the amount of $33,912.00 which it claims should have been delivered to Petron. These claims are the subject of Adversary Proceeding No. 88-616A pending in this case. Emerald Petroleum Co., Inc., which is not a party to the Adversary Proceeding, also claims an interest in the funds under a garnishment lien perfected after the filing of the Debtor's bankruptcy petition. Under the proposed settlement

and compromise, the debt owed by AMTRAK to the Debtor will be determined to amount to $15,560.00, and AMTRAK will pay over said amount to the Trustee in full and final satisfaction of his claims to the funds; AMTRAK will pay over to Petron the $29,000.00 remainder of the funds in full and final satisfaction of any and all claims it has against AMTRAK arising out of its arrangement with the Debtor; and the parties will execute mutual releases.

Unless an objection is filed with the Court and a copy thereof served upon the trustee, Paul H. Anderson, Jr., at 3600 First Atlanta Tower, 2 Peachtree Street, N.W., Atlanta, Georgia 30383 within twenty (20) days after the date of mailing of this notice, any objection to the proposed settlement and compromise will be deemed waived. Should any objection be so filed and served, the objecting party is hereby ordered to show cause before this Court on the 27 day of July, 1989, at 2:00 o'clock p.m. in Courtroom 1708, U.S. Courthouse, Richard B. Russell Building, 75 Spring Street, S.W., Atlanta, Georgia, why the proposed settlement and compromise should not be authorized.

SO ORDERED at Atlanta, Georgia this 23rd day of June, 1989.

Stacey W. Cotton
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	:	
	:	IN BANKRUPTCY CASE
HARVEY OIL CO.,	:	NO. 88-01625
	:	
	:	(CHAPTER 7; JUDGE
Debtor.	:	COTTON)

TRUSTEE'S MOTION FOR AUTHORIZATION
TO SETTLE AND COMPROMISE CONTROVERSY

COMES NOW the trustee in the above-captioned case, Paul H.Anderson, Jr., and represents to the Court as follows:

1.

Among the assets of the bankruptcy estate is a claim against the sum of $44,560.00 being held by National Railroad Passenger Corporation ("AMTRAK") under a contract between it and the Debtor pursuant to which the Debtor was to furnish diesel fuel to AMTRAK. These funds are referred to hereinafter as "the Fund."

2.

The Debtor, a minority contractor, experienced difficulty in meeting its obligations under the contract and agreed with Petron Oil Corporation ("Petron") that Petron would supply the fuel directly AMTRAK and would submit to AMTRAK the Debtor's invoices after the Debtor requested AMTRAK to mail payments directly to it care of Petron's offices. After receiving each payment, Petron was to pay to the Debtor 25 "points" per gallon of fuel supplied to AMTRAK.

3.

This procedure was followed during January and February, 1988, but AMTRAK mailed its check for March, 1988 fuel deliveries directly to the Debtor, which apparently deposited the check, in the amount of $33,912.00, to its own account and expended the funds without remitting any portion of them to Petron.

4.

When Petron learned what had happened, it had already made deliveries in April, 1988 in the total amount of the $44,560.00 Fund in question, and it made demand on AMTRAK that it pay said amount directly to Petron and that it reimburse Petron for the $33,912.00 which it never received for March, 1988 deliveries.

5.

Movant understands and believes that AMTRAK is ready, willing and able to pay over said $44,560.00 Fund to whomever the Court should determine is entitled to it.

6.

These claims by and between AMTRAK, Petron and the estate are the subject of Adversary Proceeding No. 88-616A pending before the Court.

7.

In said Proceeding, Petron claims to be entitled to the Fund on the theory that it is impressed with a constructive trust

under principles recently recognized in T&B Scottdale Contractors, Inc. v. United States, 866 F.2d 1372 (11th Cir. 1989).

8.

Movant has taken the position that the estate is entitled to the funds as a matter of law and that the principles of T&B Scottdale Contractors, Inc. v. United States are inapplicable under the circumstances of this case.

9.

In addition to Petron and the bankruptcy estate, Emerald Petroleum Co., Inc. has attempted to make a claim to the Fund under a garnishment lien by filing a motion to intervene in the Adversary Proceeding. It is clear, however, that the garnishment lien was perfected (by service of the summons of garnishment) after the filing of the bankruptcy petition and is therefore avoidable as against Movant.

Movant, Petron and AMTRAK have agreed to settle these matters according to the following general terms:

(a) The debt owed by AMTRAK to the Debtor will be declared to be in the total amount of $15,560.00, and AMTRAK will pay over to Movant that amount in full and final satisfaction of all claims of the bankruptcy estate and the Debtor against the Fund.

(b) AMTRAK will pay over to Petron the remainder of the Fund, in the amount of $29,000.00 in full and final satisfaction of any and all claims of Petron against AMTRAK arising out of its deliveries pursuant to its arrangement with the Debtor.

(c) The parties will execute appropriate mutual releases among themselves.

11.

Movant believes that the proposed settlement and compromise is fair, will spare the estate the trouble, expense and delay of continued litigation and is otherwise in the best interest of the estate.

WHEREFORE, Movant prays that the proposed settlement and compromise be approved by the Court after notice and hearing as required by law.

Paul H. Anderson, Jr.
Trustee in Bankruptcy
Georgia Bar No. 017825

3600 First Atlanta Tower
2 Peachtree Street, N.W.
Atlanta, Georgia 30383
404/577-6000